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3 BEFORE THE STATE OF WASHINGTON
4 ENERGY FACILITY SITE EVALUATION COUNCIL
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14 In the Matter of Application No. 99-1:

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17 SUMAS ENERGY 2 GENERATION
18 FACILITY
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**SUMAS ENERGY 2'S RESPONSE
TO COUNCIL ORDER NO. 756**

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22 **I. INTRODUCTION**
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24 The Council has requested the Applicant and intervenors' opinions as to whether the
25 proposed changes to the Site Certification Agreement (SCA) require new public hearings on
26 air and wetland issues to comply with the federal and state Clean Air and Clean Water Acts.
27 Council Order No. 756. Applicant, Sumas Energy 2, Inc. (SE2), has reviewed relevant
28 regulations and authorities, and concludes that no additional public hearings on either air or
29 wetland issues are required.
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36 **II. NO ADDITIONAL PUBLIC HEARINGS ARE NECESSARY**
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38 **A. No Additional Public Hearings Are Necessary on Air Issues.**
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40 No additional public hearings are required on air issues. The proposed SCA changes
41 affecting air issues regulated by the Clean Air Act are elimination of the backup diesel
42 option, emission offsets, and ammonia emission reduction. Each of these proposals was
43 discussed in prior public testimony regarding air issues. These public comments were
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1 provided to the Council's air permit contractor as well as the Council itself and the Council
2 and the air permit contractor will consider the comments in preparing the final permit. This
3 process is entirely consistent with the regulations and requirements for public comment
4 regarding air permits issued by the Council. *See* WAC 463-39-05; WAC 173-400-171. No
5 further comment is required to comply with the regulations.
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8 The Council may make changes to the Draft PSD permit without conducting further
9 hearings. Under both Washington and federal law, a final agency rule may differ from a
10 proposed rule without additional notice and public comment. *See* RCW 34.05.340 (1);
11 *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000).
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13 Under Washington law, an agency may adopt a final rule that incorporates changes to
14 the proposed rule as long as the final rule is not "substantially different" from the proposed
15 rule. RCW 34.05.340(1). The following factors guide whether a final rule is "substantially
16 different" from a proposed rule:
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18 (a) The extent to which a reasonable person affected by the adopted rule would
19 have understood that the published proposed rule would affect his or her interests;
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21 (b) The extent to which the subject of the adopted rule or the issues determined in
22 it are substantially different from the subject or issues involved in the published proposed
23 rule; and
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25 (c) The extent to which the effects of the adopted rule differ from the effects of
26 the published proposed rule. RCW 34.05.340(2).
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28 In the instant case, any reasonable person affected by air emissions from the proposed
29 SE2 facility *without* diesel firing would have understood that the proposed permit for the
30 facility *with* diesel firing, with greater emissions, would affect his or her interests. The
31 subject and issues in the proposed permit and final permit are the same – air emissions and
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1 air quality impacts from the proposed SE2 facility. The potential effects of the final action
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3 differ from the proposed action only in that they are *less* than pursuant to the proposed action.
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5 The proposed changes to the SCA to incorporate additional air quality mitigation would not
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7 make the final air permit and conditions substantially different from the proposed permit and
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9 conditions, and no additional public hearings are required under Washington law.

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11 Federal law dictates that an agency's final rule may make "substantial changes" to the
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13 proposed rule without additional notice and comment opportunities "if the changes are a
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15 'logical outgrowth' of the original proposal and the notice and comments on it." *Kennecott v.*
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17 *EPA*, 780 F.2d 445, 453 (4th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986); *see also Battery*
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19 *Recyclers*, 208 F.3d at 1058. The rationale for the conclusion that a final rule can incorporate
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21 changes to the proposed rule was logically explained as:

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23 If that rigidity [final rule being exact replica of proposed rule] were
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25 required, the purpose of notice and comment—to allow an agency
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27 to reconsider, and sometimes change, its proposal based on the
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29 comments of affected persons—would be undermined. Agencies
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31 would either refuse to make changes in response to comments or
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33 be forced into perpetual cycles of new notice and comment periods.

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35 *Battery Recyclers*, 208 F.3d at 1058-59. Thus, "[w]hile the APA requires the opportunity for
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37 public participation in rulemaking, there is no question that an agency may promulgate a final
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39 rule that differs in some particulars from its proposal, and an "agency is not required to
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41 specify every precise proposal that it may eventually adopt as a rule." *Kennecott*, 780 F.2d at
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43 451-52 (citations and quotations omitted). Permitting the SE2 facility without diesel and
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45 with the other mitigating conditions now being considered by the Council would be a "logical
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47 outgrowth" of the original proposal and comments on the proposal. Elimination of the
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49 backup diesel option, emission offsets, and ammonia emission reduction all relate to the same
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51 air issues addressed by the original proposal and all address comments raised by the public

1 during prior hearings and written comment periods. The proposed changes simply reduce the
2 potential impacts.
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4 As well as not being required, additional public hearings on air issues are
5 unnecessary. Air issues have been fully and thoroughly investigated, examined, discussed,
6 and critiqued during EFSEC hearings to date. Public hearings and written public comment
7 regarding the project generally addressed air quality issues at length, and public hearings and
8 written public comments directed specifically at the project's air permit addressed air quality
9 issues at length. These comments discussed the backup diesel option, offsets, and ammonia
10 emissions. Indeed, the permit changes now being contemplated respond directly to many of
11 the comments that were made and, in some cases, are the changes that were requested in
12 public comments. Providing another opportunity for public comment on air issues is not
13 necessary and is unlikely to provide the Council with new or different information useful to
14 its decision.
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26 **B. No Additional Public Hearings Are Necessary on Wetland Issues.**
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28 Public hearings on wetland issues are not required. The regulations governing the
29 Section 401 Certification process provide for the submission of written public comments
30 following the filing of an application but do not require a public hearing. WAC 173-225-
31 030. A public hearing is held only if the agency determines there is "sufficient public
32 interest." WAC 173-225-030(3). There has been virtually *no* public interest in wetland
33 issues regarding the SE2 project.
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40 There have been a combined total of five (5) public hearings regarding the SE2
41 project and the project's Draft Environmental Impact Statement (DEIS), in addition to public
42 meetings the Council held before the adjudicatory proceeding commenced. Wetland issues
43 could have been raised at any of these hearings, but overwhelming were not. Wetlands have
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1 not been a significant public concern at this site. In fact, with certain conditions agreed to by
2 stipulation, wetlands were not a concern to the government agencies charged with their
3 protection, the Department of Ecology and the Department of Fish and Wildlife, exs. 5 and 6,
4 and no other party to the adjudication filed testimony regarding wetland issues. Holding
5 additional public hearings on wetlands at this point would simply provide dedicated
6 opponents of the project another chance to manufacture issues and concerns they chose not to
7 raise earlier.
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14 **III. CONCLUSION**

15 Public participation is an important part of the EFSEC process, but EFSEC has
16 already provided numerous opportunities for public comment on all aspects of the SE2
17 project, including air and wetlands, and the public has commented on the project at great
18 length. Further public hearings on these issues are not required or necessary. Nonetheless, if
19 the Council decides to hold additional public hearings regarding air or wetland issues,
20 fairness and efficiency for the parties, the public, the Council and the Applicant dictate that
21 the hearings should be narrowly confined to the relevant issues and that such hearings be held
22 promptly.¹
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45 ¹ With respect to both air and wetland issues, the Council must instruct its contractors to
46 resume work. The Section 401 Certification contractor, in particular, must resume work with the
47 applicant to finalize additional wetland mitigation plans.

1 DATED: March __, 2001

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3 **PERKINS COIE LLP**

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6 By _____

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10 Attorneys for the Applicant

11 Sumas Energy 2, Inc.